United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

TO BE ARGUED
BY J. DANIEL SAGARIN

76-1140

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-1140

UNITED STATES OF AMERICA,

Plaintiff-Appelle

v.

PETER BETRES, ET AL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT PETER BETRES

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STATEMENT OF THE CASE

On May 8, 1975, a federal grand jury in New Haven returned a twelve count indictment charging defendant and nine others with a twelve count indictment arising our of the firebombing of the Sponge Rubber factory in Shelton, Connecticut.

On September 29, hearings began on defendants' (including Betres') Motion to Suppress Eyewitness Identifications. Those hearings continued daily into the trial which began with jury selection on October 6. Jury selection lasted three days and the trial continued four to five days per week until January 6. Counsel for Peter Betres gave his summation on January 9. The Government gave its final rebuttal on January 13, at which time all counsel moved for judgments of acquittal and/or mistrial because of the prosecutor's final summation. On January 13, the Court (Newman, J.) denied the motions and advised the jury that the complained of summation might have been "improper, uncalled for, and illegal."

The jury deliberated until January 29 before returning verdicts of guilty on Counts One and Two against Peter Betres. At that time, it reported deadlocked on Counts Three and Four. Motions for mistrial on those counts were denied

and an Allen charge was given the jury on Counts Three and Four. On February 3, defendant's motion for mistrial was denied and on that day, the jury returned guilty verdicts on Counts Three and Four.

Defendant's Motion for Judgment N.O.V. filed on February 5 was denied at sentencing on March 22, 1976. The court filed a written ruling on April 6, 1976.

Throughout the trial, there were motions for mistrial, severance, and suppression, all which were denied and are later referred to.

STATEMENT OF FACTS

In this bizarre trial, the Government successfully attributed to defendant Betres the roll of intermediary between the arsonists and those desiring the arson. The cold record contains sufficient evidence to support the conviction.[fn/] But consideration of this record without strict attention to (1) the real closeness of the issues, manifested by the length of the jury deliberations, and (2) the overwhelming courtroom confusion generated by the insane and prejudicial conduct of Bubar's counsel is misleading.

(1) The first return of a verdict on Peter Betres came on January 29, over two weeks after it had been charged and a full 20 days after Betres' summation. The last verdicts on Counts Three and Four were not returned until February 3.

(2) This Court's own restrictions on Mr. Zalowitz' participation in this appeal is perhaps the most persuasive evidence that counsel's claims in this regard were not exaggerated. The prejudicial behavior was early noted (10/13/75, Def. Betres' Motion to Sever from Def. Bubar, Doc. No. 143). In what came to be known as the "enchilada defense", Mr. Zalowitz gave a preview of things to come by cross-examining at length an FBI agent in an identification hearing on the use of the word "enchiladas" in his report.

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fn/ We argue later that without John Shaw's identification testimony there was insufficient evidence to convict on Counts Two, Three and Four.

Only Woody Allen could have conducted a less relevant or more bizarre examination. (T. 1350-1359). His daily clashes with the trial judge, attacks on co-defense counsel, and reliance on the defense that his client was truly a "psychic" who innocently predicted the fire continually eroded defense counsel's credibility, confused the jury, and prejudiced defendant Betres. Some of these are gathered in Bubar's supplemental appendix.

The facts just described then are essential to a fair understanding of defendant's claim that the errors he complains of were not harmless.

THE GOVERNMENT'S CASE

Against Peter Betres the Government's case was entirely circumstantial except for the testimony of John Shaw. (T. 2419 et seq.). Shaw identified Betres as the man who drove Connors, the truck driver, to Boyers, Pennsylvania, in the early morning hours of February 27, and as the man who gave Dennis Tiche $3,000 in LaGuardia airport the night before the arson. (T. 2494-2500, 2509). The facts surrounding the identification are discussed later, infra at p. 4-5).

The most damaging circumstantial evidence was the admission of Bubar's Southern Supply checkbook (Ex. 99, T. 6218) and the telephone records reduced to a chart (Ex. 141).

Without Shaw's identification, the case should not have gone to the jury and without any one of the three pieces of evidence, we think the result would have been different.

BETRES DEFENSE

Betres' defense revolved around two essential facts: (1) that his conceded contact with Bubar and presence in Shelton began with Bubar's intention to purchase certain printing presses from him and set them up in Shelton (Ex. 1221-1225, T. 9297-9303), and (2) that the real middle man was one Michael Festa (T. 5701-5724, 9170-9212). Festa's strange relationship with Bubar is referred to later in this brief (infra p. 9-10). Here we point out that he was Bubar's partner in Southern Supply Company, the account into which Bubar placed funds he received from Moeller; he was with Bubar the day after the explosion; Bubar called him at 1:07 the morning of the explosion, a seven minute call which Festa did not recall; he was a partner with Bubar in a scheme to import #2 red dye in barrels identical to those in which the gasoline was transported, and he had a financial motive to cause the fire.

The last part of Betres' defense revolved around his attack on Shaw's credibility and particularly on Shaw's identification of him as the man who brought the truck driver to Boyers, Pennsylvania two nights before the explosion and

the man who gave money to Dennis Tiche at LaGuardia airport the night before the explosion. Betres' claim was that Shaw was mistaken and that the mistake resulted from a clearly improper suggestive single photographic showing to Shaw.

ARGUMENT

INTRODUCTION

In addition to arguments advanced by other appellants which we adopt so far as applicable, there are several reasons peculiar to Peter Betres' case which call for reversal.

(1) Shaw's identification of Peter Betres resulted from a constitutionally prohibited identification procedure and the error was not harmless.

(2) It was a prejudicial error to admit Bubar's checkbook and the unauthenticated telephone records.

(3) The prosecutor's grossly improper argument.

(4) The insufficient proof of Count Four.

(5) The prejudice resulting from the failure to sever.

(6) The pyramiding of sentencing.

(7) The abuse of discretion in controlling the length of jury deliberation.

I. SHAW'S IN COURT IDENTIFICATION WAS IMPROPERLY ADMITTED INTO EVIDENCE AT TRIAL.

Some time after John Shaw was first taken into custody, a month after the explosion, by the FBI in Pittsburgh and after he had told them of his major participation in this crime, he was shown a single photograph of a man standing near

a Cadillac and was asked if it was the man he knew as Pete. (T. 2915-2916)(T. 1269, Hearing Ex. 1025). On the back of the photo he wrote, "might be Pete"[1]. Prior to testifying before the jury, he was shown the photograph again (T. 2735). On the days preceding his in court identification testimony, the Government carefully avoided in court identifications until after Shaw had an opportunity to observe the defendants in Court (T. 2668-2673). After that, he was told by the United States Attorney that the people he would have to identify would be in the courtroom (T. 2668-2672). When it came time for the identification, Mr. Dorsey moved carefully from one defendant to the next, leaving the expected doubtful[2] identification until second to last (T. 3017). He then moved to the side of the room in which the defendant was sitting and asked for the objected to identification.

1/ Shaw was never introduced to the person he met and was only"told" the individual had a name of Pete. (T. 2885).

2/ Shaw had told Dorsey he was not certain about the identification of Peter Betres, but Dorsey told Shaw Betres would be in the courtroom. (T. 3015).

In Simmons v. United States, 390 U.S. 377,384, 19 L.Ed. 2d (1968), the Supreme Court recognized the danger of improper employment of photographic identification procedures by the Government. There the court stated:

> "Even if police subsequently followed a most correct photographic identification procedure and show him the pictures of a number of individuals whom they suspect, there is some danger of an incorrect identification. This danger will be increased if police display to the witness a single photograph of an individual who generally resembles the person he saw...regardless of how the misidentification came about, the witness is apt to retain in his memory, the image of the photograph rather than the person actually seen." Simmons, 19 L.Ed. 2d at 1253, and see also P. Wall, Eyewitness Identification in Criminal Cases, 68-74 (1965).

In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court first recognized that the constitutional right to a fair trial is jeopardized when identification evidence of questionable reliability derived from suggestive confrontation procedures is presented to the fact-finder and serves as the basis for conviction of a defendant. Stovall, and subsequent cases, Foster v. California, 394 U.S. 440 (1969); Neil v. Biggers, 409 U.S. 188 (1972), have established that such evidence is subject to exclusion at trial on due process grounds.

This court, and others, have of course held in a variety of circumstances that the showing of a single photograph to a witness is impermissibly suggestive. Cf. United States ex rel Gonzales v. Zelker, 477 F.2d 797 (2 Cir. 1973),

so have other courts. United States v. Workman, 477 F.2d 151 (5 Cir. 1972)(excluding in court identification following showing of single photograph to the witness).

In Neil v. Biggers, supra, the Supreme Court particularized the totality of the circumstances which the court was to consider in weighing the likelihood of a witness' misidentification. The appropriate factors were the opportunity of the witness to view; the degree of attention by the witness; the accuracy of the prior description; the level of certainty demonstrated by the witness in the confrontation; and the length of time lapsed between the identification and the occurrence. These standards were applied by that court in Foster v. California, supra, 394 U.S. at 442 (1969) holding an in court identification improper. In Foster, the witness had failed to identify the defendant the first time he confronted him. Then there was a showup in which there was a tentative identification. Finally, there was an in-courtroom identification which the court found to be all but inevitable.

The rule in this circuit is now clear. "Evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded..." Braithwaite v. Manson, 527 F.2d 363 (2 Cir. 1975), cert. granted U.S. , 95 S.Ct. 1137 (1976). The procedure here employed could not

have been more suggestive. After hours of questioning, at a time when his cooperation had premium value (he had just spoken with the United States Attorney), Shaw was shown a single photograph (Ex. 1025) of a man standing near a Cadillac--a car of like make to the car Shaw had described (T. 2915-16) and asked, "Is this the man you know as Pete?" (T. 1269).

All of the indicia of reliability referred to in Neil v. Biggers are here lacking.

(1) There was little opportunity to observe. Shaw's identification was based on two fleeting meetings. (T. 2886). The first was near a two-lane state road in Boyers, Pennsylvania, with little lighting[fn/], "on a dark night" (T. 2886) when he was tired and when he could not tell if two or three men were in the car (T. 3281, 3274). The second chance to observe was at LaGuardia airport when a man walked up to Dennis Tiche, turned and left. The whole thing took less than half a minute Shaw admitted. (T. 2373).

(2) There was no prior description. (T. 1307, 2349).

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fn/ The lighting available was subject to some dispute. The photographs of Boyers are available here. (Ex. 1214-1219, 1228), and see Testimony of Photographer (T. 9333-9366) explaining accuracy of exhibits. The best comparison may be the difference between Ex. 1216 (downtown Butler, Pennsylvania--no booming metropolis) and 1028-1030 (Boyers, Pennsylvania where Shaw allegedly first saw "Pete" taken under like conditions.

(3) Shaw was not certain in his identification.[fn/] On cross examination, Shaw admitted he was not positive the man he knew as "Pete" was Betres. (T. 3020). He told the Grand Jury he could only "possibly" identify Pete. (T. 3019). On the photograph, he could at best state, "might be Pete". Hence the certainty of identification which has saved some other improper spreads is here lacking. Cf. Myskolowsky v. New York, ____F.2d____(2 Cir. 5/16/76) slip op. 3541, at 3549.

(4) Over a month had elapsed since the brief observation.

Under Braithwaite, consideration of reasonable likelihood of misidentification is not required. Nonetheless, factors here indicate a possible misidentification. (1) The man who drove the Cadillac was described to Shaw as a fellow named Pete who owned an after hours club in New Kensington. (T. 2954). In fact, Peter Betres was from Butler, not New Kensington. (2) Betres' defense attempted to show the middle man was more likely one Michael Festa who was shown to be close to Bubar, whom Bubar mysteriously met two days before the explosion, who was in business with Bubar in the Southern Supply Company on which the checks were written and

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fn/ Shaw was asked, "Isn't it fair to say that all through the proceeding from the time they showed you the photograph to the time you made the identification in the courtroom, you were not positive that the man you identified was Pete? He answered, "Yes, I wasn't positive. I was not positive." (T. 3020).

through which funds were funnelled (T. 5701 et seq.), whom Bubar called at 1:07 a.m. on the night of the explosion, a call which Festa "could not remember" (T. 9186), whom Bubar met the day following the explosion and who, at the time, was built not dissimilarly from Peter Betres. Moreover, the last man Bubar met at the Sponge Rubber plant the day before the explosion was Festa's partner, Frank Witek (T. 9189), whose credit card was used to make the calls the Government claimed were incriminating and who had financial motive (T. 5680 et seq.) and who was involved with Bubar in a suspicious scheme to import #2 red dye (T. 5701 et seq.).

Thus under Braithwaite and even under Neil v. Biggers, 409 U.S. 188 (1972), the exhibition of the single suggestive photograph to Shaw was "impermissibly suggestive", See also U.S. ex rel Gonzales v. Zelker, 477 F.2d 797,801 (2 Cir. 1973) cert. denied 414 U.S. 924 (1974); U.S. ex rel John v. Casselis, 489 F.2d 20,24 (2 Cir. 1973), cert. denied 416 U.S. 959 (1975); U.S. v. Reid, 517 F.2d 953,965-67 (2 Cir. 1975), and the identification should not have been permitted.

THE ERROR WAS NOT HARMLESS

The only possible issue is whether the error is harmless. Peter Betres' defense revolved around Shaw's identification and Festa's roll in conspiracy (supra, Statement of Facts, p. 2). Without the identification, there is little

evidence that could sustain Betres' conviction as an aider or abettor on Cou. Three or Four for there is no other evidence he was aware of the interstate transportation or the dynamite, and we submit we doubt if it could have supported in law or in fact Counts One and Two. The length of the jury's deliberation before returning the verdict on Count One and Two and their initial deadlock on Three and Four point clearly to this. Without Shaw's direct identification, the remaining circumstantial evidence is far less persuasive than that pointing to Festa.

In his charge on Counts Three, Judge Newman instructed the jury that Betres was there charged as an aider and abettor. He stated after instructing them on Connors:

> The government contends that all of the defendants charged in Count 3 other than Connors did take some action that makes them liable as an aider or abettor of Connors' transportation. They contend that Moeller authorized the payment, that Reverend Bubar distributed payments to Peter Betres, that Peter Betres helped dispatch Connors on his way in the early morning hours of February 28th, that Dennis Tiche and Michael Tiche helped prepare the truck's cargo and load the truck, that Coffey rented the truck and that Just made a trip to the plant on February 17th with Dennis Tiche to look over the situation. (emphasis added)
>
> I instruct you that before any of these defendants can be found guilty of aiding and abetting the interstate transportation of explosives, as charged in Count 3, you must be persuaded beyond a reasonable doubt that he took action to become an aider or abetter, as I have defined those terms, sometime prior to the interstate transportation of the explosives. (T. 10943)

This instruction was repeated twice when the jury asked for aider and abettor instruction (T. 11236, 11155, 11063, 11175).

The jury's attention on Count Two (interstate travel to commit arson), Count Three (aiding and abetting the interstate transportation of explosives) and Count Four (aiding and abetting possession of an unregistered destructive device) was focused by the Court and by the Government on the Boyers and LaGuardia identifications.

On Count Two, the court advised the jury of the aider and abettor theory. (T. 10937-10938), and specifically charged as to Peter Betres.

> The government contends that eight of the defendants did perform such an act after their interstate travel. They contend...that Betres received cash from Bubar and paid some of it to Dennis Tiche at LaGuardia Airport...(T. 10938).

Thus the jury again was directed to focus on the events concerning the dispatch of the truck at Boyers, Pennsylvania. The only evidence of that is Shaw's identification of Peter Betres.[fn/]

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fn/ The jury, of course, first reported deadlocked on Counts Three and Four (T. 11207) some two weeks after the charge and three weeks after Betres' summation.

The same aider and abettor instruction was given as to Count Four (T. 10948). Since Betres was not present on March 1, 1975 in Shelton, he could only have been convicted as an aider and abettor. Thus, again the jury had to focus on the Shaw identification claim of Betres being at Boyers or LaGuardia.

The error in admission was clearly harmful.

II. THE ADMISSION INTO EVIDENCE OF BUBAR'S CHECKBOOK AND THE TELEPHONE RECORDS WAS ERRONEOUS AND PREJUDICIAL.

A. BUBAR'S SOUTHERN SUPPLY CHECKBOOK

In Bruton v. United States, 391 U.S. 123 (1968), the Sixth Amendment's Confrontation Clause was held to prohibit introduction in a joint trial of an inculpatory confession of a codefendant who was unavailable for cross examination.

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In Davis v. Alaska, 94 S.Ct. 1105 (1974), the court refused to allow an Alaska statute restricting disclosure of juvenile records to impinge upon the fundamental right of cross examination secured by the Confrontation Clause. Id. at 1112. And in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 1049 (1973), the Court found that an application of the hearsay rule calling for exclusion of certain evidence relied on to exclude the evidence and to limit cross examination violated the Due Process Clause.

Read together, they highlight the Constitutional concern with the need for cross examination on crucial evidence. As it said, in Davis, supra:

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him...Confrontation means more than being allowed to confront the witness physically. Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415,418, 85 S.Ct. 1074,1076, 13 L.Ed. 934 (1965).

In this case, the primary piece of evidence against Peter Betres other than John Shaw's identification, was a Southern Supply Company[fn/] checkbook written of David Bubar.

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fn/ Southern Supply Company was the company founded by Bubar and Michael Festa. (T. 9170 et seq.). Festa and Bubar both had signature rights on the account. (T. Moeller's funds were deposited into this account. (T.

Its significane lay in the Government's assertion that Betres had received at least $21,000 from Bubar (see Dorsey Summation, T. 10747) as opposed to the $10,000 conceded by Betres to have been received as part of an agreement for the sale of printing presses.

The checkbook contained reference of some payments to a "P. Beatrice" (phonetically accurate, but questionable in light of Bubar's religious orientation) and others merely to "Pete". There was no evidence as to the authenticity of the book (it was produced by Bubar in response to a Grand Jury subpoena) and it was not qualified as a business record. And there was no evidence as to the date on which the notations were written.

It contained serious questions which might have been answered were Bubar available for cross examination.

(a) When was it written?

(b) Who was the "Pete" referred to? (Pete from New Kensington or another Pete?)

(c) Why was there a discrepancy in the dates of the check? (They appear to be written before the account was opened.)

(d) Why were the entries made?

(e) Did not the funds go to Michael Festa?

(f) Did he and Festa set up Betres?

(g) Why are some checks made to Peter Betres and others to cash?

The court rejected the Bruton claim outright and overruled the additional hearsay claim on its own theory (not the Government's) that the statement (in the checkbook) was a verbal act in furtherance of the conspiracy (T. 6151, 6212-18). The ruling was complicated by the court's restriction of the right to comment on Bubar's failure to take the stand and our inability to cross examine him. (T. 10636-10640, T. 10690-10691).

We submit both rulings were wrong. If Bruton has vitality, it lies in the notion that reasons of efficiency which underlie the policy of joint trials should not provide a basis for erosion of the right of confrontation. We can conceive of no reason for Bruton to apply to a written confession to law enforcement officers, but not to documents written for a defendant's own purpose. Indeed, the confession is likely to be more reliable since the circumstances surrounding the statement can be drawn from the officers who took it. If Bubar had kept a diary, could it come in against others?

But here the statement is even more ambiguous and the need to cross examine on Bubar's motive, intentions, and thinking at the time of the writing, whenever that was, is even greater.

The prejudice from its admission is clearly seen in the prosecutor's summation. He used it to justify his claim of at least $21,000 going to Peter Betres (T. 10770, 10771, 10773-10775, 10785). There is no other support in the record for the claim.

The propriety of its admission as "verbal act in furtherance of the conspiracy" is highly doubtful. There was here no allegation that record-keeping was a necessary part of the conspiracy (unlike a syndicated gambling situation where bet records, telephone numbers and payoffs are).

But even if it could by some stretch of the imagination, fall within that exception, Bruton, Davis, Chambers, and Douglas require that hearsay exception rule to give way to the need to cross examine.

The introduction of the book required counsel to advise the court that he intended to comment on Bubar's failure to take the stand which precluded cross examination thus squarely raising the DeLuna issue. DeLuna v. United States, 308 F.2d 140 (5 Cir. 1962) reh. denied 324 F.2d 375 (5 Cir. 1962). There the court held that if an attorney's duty to his client should require him to draw the jury's attention to the possible inference guilt from a codefendant's silence, severance was required. Id. at 141.

The court should have sustained the objection to the book or at least granted severance. (T. 10636-10640).

B. THE TELEPHONE RECORDS

Other counsel have dealt with the telephone records. Here we adopt their arguments to the extent appropriate and here limit our argument to our claim that it was improper to permit the evidence of phone records without an identification of the conversants or at least a showing of exclusive use of a phone. Objections were timely taken (T. 5993-6069), (Ex. 110, 141).

Here there was no foundation laid for the telephone calls. Indeed many of the calls were to public places where many besides the defendant had access (T. 6019-6037).

There being no foundation for the calls, they should have been excluded. Their admission permitted the Government to argue that the jury could infer the content of the calls (T. 10741-10746).

C. EVIDENTIARY RULINGS TAKEN TOGETHER

This court has recently confirmed that a series of questionable rulings even if not sufficient to warrant reversal alone provide a collective basis for it. U.S. v. Alfonse-Perez, ____F.2d____, 19 Cr.L. Rep. 2259 (2 Cir. 5/17/76).

That rule is applicable here. In addition to Shaw's identification, the admission of the checkbook, the admission of the unauthenticated telephone records, the court also admitted other evidence.

1. Evidence of Albert Lantz' Criminal Record

Lantz was called to testify on defendant Betres' behalf. Lantz testified, inter alia, that Betres had printing

presses for sale, that Betres had told him in January he had sold them, and that Betres did not own a black coat with a velvet collar. (Shaw had stated the man at LaGuardia wore such). The Government was permitted to extract from Lantz over objection the fact that he had a felony conviction over ten years before. Technically, the conviction fell within Rule 609 of the Federal Rules of Evidence since Lantz was released from custody approximately in 1966 (T. 9316).

But the court's reasoning set forth in the following colloquy in exercising its discretion was erroneous. It stated:

THE COURT: I understand that it doesn't mean that any conviction within the ten years is automatically -- I understand that. But still there has to be the determination.

MR. SAGARIN: What the court seems to be saying is that the more probative the evidence, the more willing the court will be to let the evidence of the conviction come in, and I think that's backward.

THE COURT: If somebody comes in and just gives some collateral matters, then it certainly is unfair to inject into it that the defendant's friend is a felon, because that is prejudicial without any significant impeaching effects. But when he offers testimony on a critical issue, then I don't see why the normal impeachment rule shouldn't be permitted.

MR. SAGARIN: Your Honor, it strikes me that the balance should be struck exactly the opposite way. When we're dealing with prejudice, if there's any question, then the doubt ought to go to the benefit of the defendant.

THE COURT: Well, that obviously can't be the rule or else you'd never have impeachment by a prior conviction. (T. 9319).

Thus its emphasis was on the importance of the testimony. It was precisely because the testimony was important that collateral issues should have been excluded.

III. THE PROSECUTOR'S SUMMATION WAS GROSSLY IMPROPER AND PREJUDICED DEFENDANT BETRES.

Prior to closing argument, counsel for Peter Betres advised the trial judge of his intention to comment on the failure of his codefendant Bubar to testify because of the serious problems that failure created with respect to proper explanation of the checkbook entries and the checks. (supra, P. 16-17, T. 10690). At that time, the court restricted (we think erroneously) the argument (T. 10636-10640), but did explain that there was some difference in defense counsel's role and the prosecutor's in this regard. Drawing the jury's attention to a failure of a defendant to testify was,

as the court aptly put it, a "pond" which the government should not "put a toe in." (T. 10690).

Thus it was with utter amazement that defense counsel listened to the prosecutor gear his rebuttal summation to the failure of defendant Betres, among others, to explain or offer a certain evidence. The summation occurring four days after Betres' was nothing less than a comment of Betres' failure to testify and his failure to produce evidence. It is not just one specific comment to which we object, but rather the whole rebuttal which considered in its entirety asked the jury to draw inferences from one defendant's or the other's failure to produce evidence. For example, when the prosecutor asked, "What evidence was there the deal (printing press sale to Bubar) was consummated?" (T. 10853), he highlights the failure to testify of the only persons who could so testify (Bubar and Betres). When he called the jury's attention to Ron Betres' failure to explain a phone call, he was urging the drawing of an adverse inference.

When he says, "There's no evidence of a plane ticket, no evidence of a reservation, no evidence of payment" (T. 10854), he invites adverse reaction to Betres' constitutional election.

This court has repeatedly addressed itself to problems of prosecutorial misbehavior in summation. United States v. Bevona, 487 F.2d 443 (2 Cir. 1973); United States v. White,

486 F.2d 204 (2 Cir. 1973); United States v. Drummond, 481 F.2d 62 (2 Cir. 1973). Recently it confirmed that such misconduct warranted reversal. United States v. Burse, ____F.2d____, slip op. 2507, 2511 et seq. (2 Cir. 3/8/76). In Burse, the prosecutor "implied that the failure of the defendant to provide proof of his innocence was to be taken as evidence of his guilt and came dangerously close to direct comment of Burse's failure to testify." It noted the impact was clearly seen by the trial court which felt compelled to tell the jury that the prosecution may have misrepresented.

Here the comment was more direct and more prejudicial:

(1) It called for the jury to believe it was the defendant's duty to produce evidence.

(2) It came in rebuttal with no chance to answer it and was the very theme of the closing argument.

(3) The rebuttal was nearly five days after Betres' argument so the impact of Betres' claims were worn off.

(4) It was not invited.

(5) The court, denying the motions for mistrial and judgment of acquittal only made it worse by "conditionally" calling it "improper, uncalled for and illegal".

It is unfortunate that this clearly improper summation took place in a case of such length. But the Constitution ought

not depend upon such matters. Joinder in a long trial is inherently prejudicial, but it ought not to be a basis for erosion of guaranteed rights. The trial length, at best, a reason for imposing higher standards on the prosecution. Here retrial would not be essential since the State of Connecticut has chosen to continue its State arson prosecution against these defendants.

IV. THE COURT ERRED IN NOT GRANTING THE MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT IV.

At the close of the Government's case (T. 11/26/75), at the close of the entire evidence (T. 1/6/76), and following conviction (T. 3/22/76),the court denied motions for judgment of acquittal on this and other Counts.

Count Four charges the defendants with receipt and possession of an unregistered destructive device in violation of 26 U.S.C. &5861(d) and 18 U.S.C. §2.

There were three reasons the motions should have been granted. First, the dynamite, detonating cord, and gasoline were not a "device" required to be registered. Secondly, the proof of nonregistration was defective and third, there was no evidence from which it could be found Betres "aided and abetted" the "receipt" as opposed to the "delivery" (26 U.S.C. §5861(j)) of the bomb.

1. THE "DEVICE" HERE DID NOT REQUIRE REGISTRATION.

The firearm the defendants were convicted of possessing is a "bomb", 26 U.S.C. §5845(f)(1)(a). It is further alleged that this bomb was an explosive device made out of dynamite, detonating or primer cold, blasting caps, and gasoline.

The defendant contends that the alleged explosive device does not constitute a "bomb" under the provisions of the National Firearms Act, and that, therefore, failure to register such a device is not a violation of that Act.

The Act does not require the registration of all devices which may be used for explosive purposes. In United States v. Posnjak, 457 F.2d 1110 (1972), the Court of Appeals held that possession of 4100 sticks of dynamite with unattached fuses and caps did not constitute possession of a "destructive device" under the provisions of 26 U.S.C. §5861(d). The court obviously did not mean that dynamite could not be used destrictively, but rather that it was not one of "objectively identifiable weapons of war and 'gangster-type' weapons", 457 F.2d at 1116, which it was the Act's sole purpose to reach.

The court's reasoning on this point is quite careful: The National Firearms Act is intended to reach only objectively identifiable weapons of war and gangster-type weapons. Dynamite can be used as a weapon of war, but also as a legal commercial device for legitimate purposes. Therefore, it is not

an objective weapon of war, but only a weapon of war when so transformed by the intent of the user. That being so, if registration of dynamite is required, it would be required only where the user intended to employ dynamite as a weapon of war, that is, illegally. Since requiring such registration would virtually identify the possessor as an individual of intent to commit an illegal act, it would violate the user's privilege against self-incrimination. Congress could not have intended to violate that privilege. In conclusion, the Act cannot reach only devices whose mere description is enough to identify them as weapons of war; where a question of intention must be reached, the device is outside the scope of the Act. 457 F.2d, at 1117-1118.

This reasoning is made clearer by United States v. Cruz, 492 F.2d 217 (2 Cir. 1974), in which the court held that a Molotov cocktail was a destructive device within the meaning of 26 U.S.C. §5861. The court held such a device falls within the statute because it is "objectively destructive", 492 F.2d, at 219 (referring to the court's opinion in Posnjak), Posnjak, however, did not use the phrase "objectively destructive device," but rather "objectively identifiable weapons of war...." Posnjak, supra, 457 F.2d at 1116. Since a Molotov cocktail is an objectively identifiable weapon of war, such an interpretation--taking "objectively destructive device" to mean "objectively identifiable weapon of war" is perfectly sensible.

However, the alleged device here in question is not an objectively identifiable weapon of war. It is an aggregation of parts susceptible of legal commercial use so combined as to be useable for destructive purposes only if the users so intend. It is not an objectively identifiable weapon in the obvious sense that a Molotov cocktail is a weapon of war. Nor it is a "gangster-type weapon" of any sort. It can only be deemed a bomb if the possessors intended to use it as a bomb; such a device is not objectively identifiable; it fails, under Posnjak, outside the scope of the statute.

To hold otherwise would be to raise the self-incrimination problem Posnjak avoided. Registration of an aggregation of legal and commercially useful parts as a bomb would be to declare the possessor's intent to use them illegally. Any statute raising so substantial a hazard of self-incrimination would violate the Fifth Amendment privilege against self-incrimination. Marchetti v. United States, 390 U.S. 39 (1968); Haynes v. United States, 390 U.S. 85 (1968). Only the construction of the statute given in Posnjak avoids the problem.

Since the device here allegedly in the possession of the defendants is not an objectively identifiable weapon of war; it's not a "bomb" in the meaning of 20 U.S.C. §5845, and its unregistered possession does not violate 28 U.S.C. §5861(d).

2. THE PROOF OF NONREGISTRATION WAS INSUFFICIENT

The only proof the Government offered of nonregistration were certified copies of records of nonregistration for each of the defendants and for John Shaw. (Ex. 131-140, T. 7475). Each of those forms merely referred to certain names without identifying further the person to whom it was referring. For example, the form merely states Peter Betres did not register, but does not state Peter Betres of Butler, Pennsylvania. More importantly, the form merely states that on the date of the signing of the form, no device "is" registered. It does not state the device "is not and was not as of March 1, 1975" registered. Since the indictment claimed nonregistration on a particular day, there should have been proof relating to that day.

3. THERE WAS NO EVIDENCE TO SUPPORT A CONVICTION ON COUNT FOUR.

5861(j) of Title 26 proscribes delivery of an unregistered destructive device. But the charge involved not delivery, but "receipt and possession". The undisputed facts showed Betres was not in Shelton on March 1, and thus could not have aided the receipt.

Thus even if the jury believed Shaw's identification, they might have found that Betres aided the delivery, but there was no evidence from which it could be found he aided the receipt. He accordingly ought not have been convicted on Count IV.

V. COUNSEL FOR DEFENDANT BUBAR'S CONDUCT SO DEPARTED FROM THE STANDARDS OF CONDUCT REQUIRED OF COUNSEL THAT IT PREJUDICED ALL DEFENDANTS TRIED WITH HIM, AND THE TRIAL COURT ABUSED ITS DISCRETION AND PREJUDICED BETRES IN DENYING HIS MOTIONS FOR SEVERANCE.

That due process requires that a defendant be given a trial conducted in an atmosphere promoting reasoned judgment is apparent. We are aware that Bubar's current counsel has gathered some, but not all, of the bizarre actions of Mr. Zalowitz in an appendix (Bubar's Supplemental Appendix on Appeal). We rely on those, but caution that no reading of this record can recreate the atmosphere of the courthouse.

There was a clear and continuing conflict over and above the strange behavior in that Betres was attempting to show Bubar and Festa had conspired to commit the arson and that Bubar was insane (Doc. No. 157), while Bubar's counsel chose to portray his client as a psychic who accurately predicted the explosion. There were continuous objections and requests for severance fn/ to this line which necessarily prejudiced anyone who was in contact with Bubar at the time of the prediction. (Cf. T. 7687-7692).

A. THE GENERAL RULE

The foregoing, we believe, sufficiently discloses that there was a clear and continuous conflict in the trial of this case between the defense of the defendant, and the defense of the other defendants.

fn/ There were at least eleven requests for severance either made or joined in by Betres.

Defendant, Betres, prior to the trial, at the start of the trial, and many times throughout the trial, moved the court for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. All were denied. It is generally true that a trial judge has broad discretion in determining whether to grant a motion to sever. However, if a joint trial is manifestly prejudicial to one or more defendants, failure to sever is "an abuse of discretion in violation of Rule 14, Federal Rules of Criminal Procedure. United States v. Donoway, 447 F.2d 940 (9 Cir. 1971) at 943. The term "prejudice" as used in Rule 14 is not necessarily as great as the prejudice an appellate court must find for reversible error...its meaning is not subject to rigid definition and depends to a considerable extent on the perception of the district judge. Prejudice may also lie in shouldering substantial risk that a situation will not be remedied. Garris v. United States, 418 F.2d 467 (D.C. Cir. 1969) at 469-470 Thus, notwithstanding proper joinder in the first instance, and here there is no claim that joinder was improper, the trial judge is under a continuing duty at all stages of the proceedings to grant severance on application by a defendant showing prejudice. Schaeffer v. United States, 362 U.S. 511, 80 S.Ct. 945 (1960) at 948; Hill v. United States, 418 F.2d 449 (5 Cir. 1968 .

Severance is required where there is evidence which is inadmissible and prejudicial as to one defendant but admissible and exculpatory as to another, or (2) where the defendants advance defenses which are mutually exclusive, and (3) where there is substantial prejudice resulting from the spillover effect of evidence introduced solely against the codefendants. Byrd v. Wainwright, 428 F.2d 1017 (5 Cir. 1970); United States v. Magnotti, 51 FRD 1 (D.Conn. 1970); United States v. Echeles, 352 F.2d 392 (7 Cir. 1965); DeLuna v. United States, 308 F.2d 140 (5 Cir. 1962); United States v. Kelley, 349 F.2d 720 (2 Cir. 1965); United States v. Branker, 395 F.2d 881,887 (2 Cir. 1968).

The reasons for severance are founded on the principal that evidence against one person may not be used against the codefendant. Where the same is done, prejudice is implicit. Schaeffer v. United States, 362 U.S. 511, 80 S.Ct. 945 at 952 (dissenting opinion of Justice Douglas) (1960).

Distinguished jurists throughout the federal system have repeatedly warned of dangers of mass trials. See, e.g., Krulewicz v. United States, 336 U.S. 440, 445-446 (1949); United States v. Gaston, 37 FRD 476 (D.D.C. 1965); DeLuna v. United States, 308 F.2d 140 (5 Cir. 1962) rehearing denied 324 F.2d 375 (5 Cir. 1963); Kotteakos v. United States,

328 U.S. 750, 767-771 (1946); see 1 Wright Federal Practice and Procedure, Sec. 226, p. 463 (1969). This court has not hesitated to order severance and to reverse convictions, where prejudice resulted from the joint trial. United States v. Branker, 395 F.2d 881,887 (2 Cir. 1968). In Branker this court reversed the convictions of four defendants of eight defendants who went to trial on the grounds that the trial court had improperly refused to grant them separate trials. The court there said, as is here true, as trial days go by, the mounting proof of guilt of one is likely to affect another. Citing cases Id. at 887, 888. No amount of cautionary instruction could have undone the harm. United States v. Kelly, 349 F.2d 720. It is the duty of a court to constitute an impregnable barrier against the use of testimonial and documentary evidence relevant against one codefendant to the prejudice of a codefendant. United States v. Kelly, 349 F.2d 720, 758-759 (2 Cir. 1965) reversing the conviction of a codefendant where the trial judge violated his continuing duty at all stages of the trial to grant a severance if prejudice to a particular defendant is made manifest.

See also United States v. Reed, 376 F.2d 226 (7 Cir. 1967); United States v. Sanders, 226 F.Supp. 615, 621-22 (D.C. La. 1967); United States v. Goss, 329 F.2d 180 (4 Cir. 1964). In Kelly, supra, it was held reversible error that defendant was not severed from its codefendants against whom

there was considerably more evidence. The court stated that it was an abuse of discretion to permit the slow but inexorable accumulation of tremendous amounts of evidence showing the codefendants as swindlers to necessarily rub off on the defendant who is much less guilty without severing the defendants. 349 F.2d at 759.

Here the prejudice resulted not from a single ruling which a jury over five months might have forgotten, but from the daily injection into this trial of a bizarre, nightmarish parody of the criminal process and from the pursuit of a line of defense (the psychic prediction) prejudicial to others.

VI. THE COURT IMPROPERLY CUMULATED THE SENTENCE.

The court sentenced defendant Betres to a total of fifteen years reached by consecutive five-year sentences on Counts One and Two and concurrent ten-year sentences on Three and Four, each of which runs concurrently with the five-year sentence on Count Two.

The conviction under Count Four calls for a maximum penalty of ten years, but also calls for a prisoner to become eligible for parole at any time. 26 U.S.C. §5871. The sentencing court decision to make Count Four run consecutive to Count One frustrates the statutory purpose of early consideration for parole.

Secondly, the court's cumulation of sentences for one series of transaction merely provides an incentive for prosecutors to multiply charges. Here Congress set an appropriate penalty for the major federal crime--interstate transportation of explosives. It found that to be ten years. That should be the maximum sentence in this case. We believe the crime merged into Count Three. Cf. Hackett v. United States, 348 F.2d 883, cert. denied 382 U.S. 1089 (6 Cir. 1965); United States v. Clements, 471 F.2d 1253 (9 Cir. 1972).

The travel alleged to be caused by Peter Betres in Count Two is the transportation interstate of a destructive device. We accordingly ask this court for relief from what we believe to be illegally pryamided sentences. Cf. Glinsky v. United States, 335 F.2d 914 (9 Cir. 1964).

VII. THE COURT ERRED IN NOT GRANTING THE MOTION FOR MISTRIAL ON COUNTS THREE AND FOUR AFTER THE JURY REPORTED DEADLOCKED AND GIVING THE JURY SUPPLEMENTAL INSTRUCTIONS.

The length of jury deliberations and whether or not to give an "Allen" charge are matters ordinarily left within the trial court's discretion. Cf. United States v. Barash, 412 F.2d 26 (2 Cir. 1969) cert. denied 396 U.S. 832; United States v. Caracci, 446 F.2d 173 (5 Cir. 1971). But that discretion is not unbridled and trial courts in an effort to dispose of matters have overstepped limits. See United States v. Thomas, 449 F.2d 1117 (D.C. Cir. 1971); United States v. Williams, 447 F.2d 894 (5 Cir. 1971); United States v. Diamond, 430 F.2d 688 (5 Cir. 1970); United States v. Flanders, 451 F.2d 880 (1 Cir. 1971).

Where the line of abuse of discretion lies is difficult to discern, but here several factors indicate the refusal to grant a mistrial was error. (T. 11236, 11254-11255).

(1) The jury had several times (T. 11063, 11155, 11194, 11175, 11241) prior to deadlock asked for the aider and abettor instructions. Each time the court repeated its instruction focusing the jury's attention on the government's claim of Betres being at LaGuardia without balancing it with Betres' defense of false identification (T. 11091, 11096-97).

(2) Betres had called his last witness on December 16, 1975, nearly six weeks before.

(3) Betres had summed up to the jury over three weeks before.

(4) One of the juror's (Pond) had been ill with an ulcer attack throughout and on the deliberation day before the final verdict indicated he was going to the doctor (T. 11258). In fact after the Betres verdict, but before the final result, it was disclosed to the court he had not gone (T. 11261-11263).

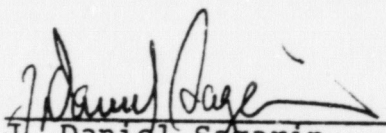
At some point, there must be a limit as to what a jury can be expected to weigh. We think it was totally unrealistic to expect them to be able to weigh with impartiality and recall the claims of defendants.

Accordingly, we think the line was crossed and the mistrial on Counts Three and Four should have been granted.

CONCLUSION

Peter Betres' convictions should be reversed with instructions to enter judgments of acquittal on Counts Three and Four and for a new trial on Counts One and Two. Alternatively, his case should be set for a new trial on all counts. Lastly, in the event the Court finds reversal not called for, it should direct a modification of the sentence.

Respectfully submitted,



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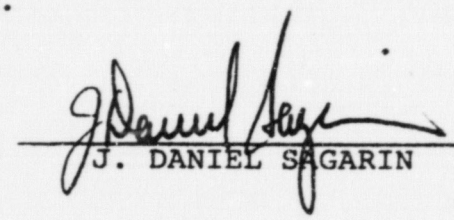
September 27, 1976

CERTIFICATE OF SERVICE

I hereby certify that the within and foregoing Brief was sent, postage prepaid, to: Paul Orth, Esq., Hoppin, Carey & Powell, 266 Pearl Street, Hartford, Connecticut 06103, Alan Neigher, Esq., 855 Main Street, Bridgeport, Connecticut 06604, Igor I. Sikorsky, Jr., Esq., 111 Pearl Street, Hartford, Connecticut 06103, Gregory B. Craig, Esq., c/o Elliot Noyes, 210 Country Club Road, New Canaan, Connecticut, Peter C. Dorsey, United States Attorney, P. O. Box 1824, New Haven, Connecticut 06511, and Andrew B. Bowman, Esq., P. O. Box 1824, New Haven, Connecticut 06511, on the 27th day of September, 1976.



J. DANIEL SAGARIN